APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SOUTHWESTERN CABLE CO., *Petitioner,* vs. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,* JACK O. GROSS, et al., *Intervenors.*	No. 21,183
MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO. and TRANS-VIDEO CORP., *Petitioners,* vs. UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION, *Respondents,* JACK O. GROSS, et al., *Intervenors.*	No. 21,192

[April 28, 1967]

On Petition for Review of a Memorandum Opinion and Order of the Federal Communications Commission

Before: BARNES and ELY, Circuit Judges; PECKHAM,* District Judge

BARNES, Circuit Judge:

This is a consolidation of two petitions to review and set aside portions of an order of the Federal Communications Commission

*Robert F. Peckham, Northern District of California, sitting by designation.

(hereinafter "FCC" or "Commission"). Our jurisdiction rests upon 5 U.S.C. § 1032 and 47 U.S.C. § 402(a).

Southwestern Cable Company owns a community antenna television system (commonly designated a CATV system) in the San Diego area. Mission Cable TV, Inc. and Pacific Video Cable Company own CATV systems in the San Diego area which are operated by Trans-Video Corporation which owns all of Pacific and a majority of Mission.

CATV is a way of delivering good television reception to areas greatly removed from the originating station. The concept includes the building of a large antenna in an area where reception is good. The antenna picks up the signal of one or more stations and transmits it or them, either by wire or microwave, to the area of poor reception. In the poor reception area the signal is distributed to individual television receivers by wire, each receiver paying installation and monthly service fees. Southwestern, Mission and Pacific, petitioners here, all use cable systems rather than microwave for transmission of the signals.

San Diego is about 120 miles south of Los Angeles. San Diego is served by two VHF and one UHF television stations in San Diego and two VHF stations in nearby Tijuana, Mexico. A construction permit has been issued for another UHF station, and an application is pending for still another. For the most part, San Diego receivers cannot receive the signals of Los Angeles stations through the air. It is by CATV that many San Diegans can now watch Los Angeles programs.

The recent growth of CATV systems has come to the attention of the FCC. At first the FCC, without dissent, held it had no jurisdiction over CATV. 26 F.C.C. 403, 427-28 (1959). It next held it was authorized to deny a CATV microwave transmission license for economic reasons. *Carter Mountain Transmission Corp.*, 32 F.C.C. 459 (1962, *aff'd* 321 F.2d 359 (D.C. Cir. 1963)), *cert. denied* 375 U.S. 951 (1963). It then asserted jurisdiction only over CATV systems using microwave facilities to transmit their signals. See First Report and Order, 38 F.C.C. 683, 30 Fed. Reg. 6038 (1965). On April 23, 1965, the Commission released a Notice of Inquiry and Notice of proposed Rule Making (1 F.C.C.2d 453, 30 Fed. Reg. 6078 (1965)) looking toward regulation of all CATV systems. On February 15, 1966, the Commission issued a news

release announcing that new rules would shortly be adopted applying to non-microwave CATV systems. These rules were adopted on March 8, 1966, and published on March 17, 1966. Second Report and Order, 2 F.C.C.2d 725, 31 Fed. Reg. 4540 (1966). The rules provided, inter alia, that (1) CATV systems must carry the signals of local and nearby stations, (2) CATV systems cannot carry on the same day a signal which duplicates a program of a local station, and (3) Commission approval is required for a CATV system to carry a signal beyond its Grade B contour.[1]

In addition to the foregoing rules, the Commission adopted Rule 74.1109 (47 C.F.R. § 74.1109), which provides that on petition by a CATV system, television station or other interested person the Commission may waive any of its rules or impose additional requirements. Rule 74.1109(f) provides in part:

> "In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief."

On March 17, 1966, Midwest Television, Inc., a licensee of a San Diego VHF station (and herein an intervenor), petitioned under Rule 74.1109(f) for temporary relief pending a hearing on the effects of CATV on the television stations in San Diego. On July 25, 1966, the Commission, in the order under review here, granted Midwest the temporary relief it sought by limiting the CATV systems, petitioners here, to (1) delivering Los Angeles

---

[1]Grade B is one of a trio of ratings according to the strength of a signal. The grades are defined in terms of the level of signal intensity which is required to provide an acceptable signal to 90% of the locations for the following percentages of time: Principal City Grade—90%; Grade A—70%; Grade B—50%.

The signal, of course, is strongest nearer the point of origination, and becomes progressively weaker as it is removed further from the point of origination. Intervening obstacles such as mountains or other high elevations, poor ground conductivity, or seasonal and other changes in atmospheric conditions can often impair or make impossible good television reception. That area where the signal reception is Grade B is described as being within the Grade B contour. CATV systems, of course, build their antennae in Principal City areas and then carry the signals into the Grade B contour and beyond.

signals to subscribers in the area which they served on February 15, 1966; (2) adding subscribers in other areas, but to them carrying only San Diego-Tijuana signals; and (3) continuing to provide the service they had been providing prior to the date of the order.

Petitioners sought review by this court of the July 25, 1966 order, and asked for a stay of the Commission's order. After argument we issued an interlocutory injunction against enforcement of the order as it prevents the addition of new subscribers to the trunk and feeder lines in existence on August 23, 1966.

Petitioners have specified many grounds for setting aside the Commission's order, some of constitutional dimension. Initially we must consider the assertion that the Commission did not have the power to issue the order in question. We agree with the petitioners that the Commission was without power to act as it did.[2]

The order issued by the Commission was prohibitory in nature. Though petitioners contend that it was in truth a cease and desist order, the Commission has expressly denied that it is such an order and disclaimed the authority of 47 U.S.C. § 312 which authorizes such orders. The Commission tells us that its only

---

[2]After this case was heard, the Commission issued its Memorandum Opinion and Order, disposing of various petitions which had been filed, largely by cable-television owners and operators, seeking reconsideration of the Commission's Second Report and Order (2 F.C.C.2d 725) which had adopted rules with respect to CATV. Memorandum Opinion and Order, ... F.C.C.2d ..... (released January 19, 1967). Of the seven Commissioners, one did not participate, one was absent and two dissented. See particularly the dissenting opinion of Commissioner Loevinger, wherein he states, among other things:

". . . [I]t is by no means clear that there is a majority of the Commission in support of the jurisdiction that is in fact being exercised; . . . .

"If such reasons [as given in the majority opinion] are adequate to support jurisdiction, then there is no limit to the authority of this Commission.

"I do not believe that Congress even intended to grant or will in the future ever act to grant such a vague and limitless jurisdiction as the Commission now asserts and exercises. . . . [T]here is a strong . . . reason for insisting that the broad power of regulation should be confined within the jurisdiction specified by Congress in statutes, ..."

sources of authority for the order in issue are section 4(i) of the Act[3] and section 303(r) of the Act.[4]

> "The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions." 47 U.S.C. § 154(i).
>
> ". . . [T]he Commission . . . shall—
>
> (r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this chapter, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or may hereafter become a party." 47 U.S.C. § 303(r).

These provisions are general, couched in broad and indefinite terms.[5] There is no doubt that Congress intended by these provisions to provide the Commission with a degree of flexibility in performing its important tasks. Such provisions, however, by their own terms, are to be measured by the Act and its structure and purpose.

The method of regulation of broadcasting chosen by Congress was licensing. The Commission was created and charged with supervising the licensing function, to the end of promoting the development of the best radio (and later television) service in the public interest. To fulfill its duties the Commission was given two

---

[3]47 U.S.C. § 154(i). References to the Act or to sections are to the Communications Act of 1934, 48 Stat. 1064 (codified in scattered sections of 47 U.S.C.), unless otherwise indicated.

[4]47 U.S.C. § 303(r).

[5]We note in passing the placement of these provisions within the structure of the Act. Section 154(i) is preceded by a provision defining a quorum and authorizing judicial notice of the Commission's seal (47 U.S.C. § 154(h)), and followed by one regarding the conduct of proceedings (47 U.S.C. § 154(j)).

Section 303(r) is preceded by a provision authorizing the Commission to require painting or illuminating of radio towers (47 U.S.C. § 303(q)), and followed by one authorizing the Commission to require all television receivers to be able to receive all frequencies.

weapons under section 312, revocation of the license and (since 1952) the cease and desist order. Restricting these powers, however, Congress specified certain procedural safeguards, 47 U.S.C. § 312(c), (d) and (e).

We are fully aware of the authorities which have sustained grants of power to agencies and interpreted such powers so as to give those agencies a high degree of flexibility. In *Clear Channel Broadcasting Service v. United States*, 284 F.2d 222 (D.C. Cir. 1960), the FCC's powers, specifically including section 303(r), were described as "broad" in reference to an order regarding skywave interference. In *Public Service Comm'n v. FPC*, 327 F.2d 893 (D.C. Cir. 1964), the District of Columbia Circuit discussed the powers of the Federal Power Commission with language which we feel is equally applicable to the authority of the FCC.

> "All authority of the Commission need not be found in explicit language. . . . While the action of the Commission must conform with the terms, policies and purposes of the Act, it may use means which are not in all respects spelled out in detail." 327 F.2d at 897.

We cannot, however, extend this language to include the power claimed by the Commission in the case at bar. We note some of the cases in which the Commission's authority has been sustained. *Bendix Aviation Corp. v. FCC*, 272 F.2d 533 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 965 (1960), concerned an application by Bendix for authority to use the 430 Mc radio frequency in developing an aircraft collision prevention system. Prior to the application, frequencies in the 420-450 Mc band had been reserved exclusively for government use. The court sustained denial of the application without a hearing. The denial of the authority Bendix sought, which would have been a license, was challenged procedurally in that it had been denied without a hearing. Although the court cites section 4(i) and 303(r) of the Act, both of which are set out above, there appears to have been no real challenge to the Commission's power to deny the license, so that the authority for the court's decision is that cited as section 4(j) of the Act (47 U.S.C. § 154(j)), providing for procedural flexibility. *Cf. FCC v. Schreiber*, 381 U.S. 279 (1965).

Mesa Microwave, Inc. v. FCC, 262 F.2d 723 (D.C. Cir. 1958), is a case dealing with CATV problems. Mesa used microwave to

carry signals and therefore needed a license. It filed an application, but no action was taken as the Commission had "frozen" all applications pending an inquiry. The petition for a writ of mandamus was denied because the delay had not been so great (about six months) as to warrant the extraordinary remedy of mandamus. Later, in *Kessler v. FCC*, 326 F.2d 673 (D.C. Cir. 1963), the court described the action in *Mesa* as declining to upset a "freeze" on the processing of license applications. In *Kessler* the District of Columbia Circuit affirmed the "freeze" order as it halted the acceptance of applications for certain radio licenses. The basis of the decision was that the "freeze" order was procedural, and the later denial of the applications without a hearing was permissible. The unstated authority is probably section 4(j) of the Act, as in *Bendix, supra.*

The decisions examined above deal either with the licensing authority of the Commission or procedural questions related to licensing proceedings.[6] Petitioners in the case at bar point out that they have not sought a license from the Commission, nor are they required to do so.

Our resolution of the present case is guided by the language of the Supreme Court in *Regents of the University System of Georgia v. Carroll*, 338 U.S. 586 (1950). In that case the FCC granted a license on the condition that the station repudiate its contract with certain persons, which contract, it was found by the Commission, endangered the financial ability of the station. After repudiation, a state court entered judgment for breach of contract against the station. The contention was raised that by its order the FCC had invalidated the contract. The Supreme Court noted the scope of the agency power:

> "As an administrative body, the Commission must find its powers within the compass of the authority given it by Congress. . . . These cases [*FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940), *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943)] make clear that the Commission's

[6]The Commission's primary authority is such a case. *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), dealt with the Commission's rule that it would not issue a license if the applicant already operated five television stations. Storer, owning five, objected that its application for a sixth was denied without a hearing.

regulatory powers center around the grant of licenses. They contain no reference to any sanctions, other than refusal or revocation of a license, that the Commission may apply to enforce its decisions." 338 U.S. at 597-99 (footnotes omitted).

Dealing specifically with one of the provisions in issue here, to wit, the powers under section 303(r) of the Act, the Court said:

> "One suggestion is that petitioner's position has a specific statutory basis [for invalidating the contract] in § 303(r), which permits the Commission to prescribe such 'conditions' as are 'necessary to carry out the provisions' of the Act. We do not think the suggestion is sound. Congress has enabled the Commission to regulate the use of broadcasting channels through a licensing power. *It is in connection with this power that § 303(r) is to be interpreted.*" 338 U.S. at 600 (emphasis added).

In *Carroll* the Court recognized the Commission's embarrassing lack of ability to issue cease and desist orders together with its attempts to remedy the situation. The Court noted that the Commission had requested the power from Congress, "but, so far as we are aware, the Commission request did not go beyond asking for power to issue a cease and desist order *against a licensee.*" 338 U.S. at 602 (emphasis added). The Court had reference to S. 1333, 80th Cong., 1st Sess. (1947), which was one of the predecessors to the Communications Act Amendments, 1952, 66 Stat. 711 (1952). It was the 1952 amendments which enacted the cease and desist authority of section 312 of the Act.[7] We point this out to show that in 1950, when *Carroll* was decided and sections 4(i) and 303(r) were exactly as they are today, the power the Commission possessed was exercisable only against licensees or applicants. Put another way, sections 4(i) and 303(r) did not, in 1950, authorize action against a nonlicensee.

---

[7]The direction of the Commission's powers was apparently understood by Congress to be limited to licensees when it considered the 1952 amendments to the Act. "It is believed that the authority to issue cease and desist orders will give the Commission a means by which it can secure compliance with the law and regulations *by licensees.*" Conf. Rept. No. 3426, 1952 U.S. Code, Cong. & Ad. News 2234 (emphasis added).

The Supreme Court again analyzed the limits of the Commission's power in *FCC v. American Broadcasting Co.*, 347 U.S. 294 (1954). In that case the Commission had issued rules against "give-away" programs. The Court was concerned with the relationship between the Commission's action and the criminal sanctions against broadcasting lottery information, 18 U.S.C. § 1304.

> "Like the court below, we have no doubt that the Commission, concurrently with the Department of Justice, has power to enforce § 1304. Indeed, the Commission would be remiss in its duties if it failed, *in the exercise of its licensing authority*, to aid in implementing the statute, either by general rule or by individual decisions.[7] But the Commission's power in this respect is limited by the scope of the statute. Unless the 'give-away' programs involved here are illegal under [18 U.S.C.] § 1304, the Commission cannot employ the statute [the Communications Act] to make them so by agency action." 347 U.S. at 289-90 (emphasis added).

The Court's footnote specifically notes sections 4(i) and 303(r). In view of the emphasized portion of *American Broadcasting* and the specific language of *Carroll*, we reach the conclusion that sections 4(i) and 303(r) are limited to the scope of the Commission's licensing authority. *Cf. Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 433-34 (1963) (Brennan, J., concurring).

The logic of our conclusion seems to us inescapable. If the authority of sections 4(i) and 303(r) were as broad and extensive as the Commission urges, the authority of section 312 to issue cease and desist orders would be meaningless or repetitive. There is nothing to indicate that if the Commission is empowered to issue an order like that under review it cannot similarly issue a cease and desist order without the safeguards of section 312. *Cf. United States v. National Plastikwear Fashions, Inc.*, 123 F.Supp. 791 (S.D. N.Y. 1954). We must assume that when Congress in 1952 gave the Commission the power to issue cease and desist orders it was not duplicating an already existing power.

Our conclusion that the Commission lacked the power to issue the order in question requires that the order be vacated and set aside. In light of our disposition of the case, we decline to express any opinion as to the other issues raised in this proceeding.

The Memorandum Opinion and Order of July 25, 1966, is VACATED and SET ASIDE to the extent that it limits the operations of the petitioners as set forth in paragraphs 24-26 of that order.

ELY, Circuit Judge (Concurring):

I endorse the carefully researched opinion of my Brother Barnes, and I concur in its conclusions. I think it appropriate, however, to emphasize the basic justice of our decision.

As Judge Barnes relates, the Commission had, prior to the commencement of petitioners' activities, disavowed its power to regulate such activities.[1] It is not unreasonable to assume that the petitioners considered this history in making their determinations to embark upon their ventures. They then undertook their lawful pursuits, investing substantial sums of money and, incidentally, proceeding under the auspices of the responsible San Diego officials who issued the required municipal permits. Not until petitioners had incurred the expense of installing necessary and fixed facilities and had acquired subscribing customers did the Commission presume to issue the order which, if enforceable, would adversely affect, if not destroy, the petitioners' investments.

In the light of the only conferred powers under which its authority exists, reviewed by my Brother Barnes, and in the light of all the circumstances, some of which I have briefly stated, I believe that the Commission trespassed upon constitutional safeguards against the confiscation of property.[2]

---

[1]It had unsuccessfully sought legislation which would have specifically given it the jurisdiction which it now claims to have always had S. 2653, 86th Cong., 1st Sess. (1960).

[2]Compare *California Citizens Band Association, Inc. v. United States*, ... F.2d ..... (9th Cir. 1967), wherein we very recently held that the Commission was fully empowered to adopt reasonable regulations affecting licensees whose operations clearly fell within the Commission's jurisdictional powers of supervision and regulation.

APPENDIX B

In the United States Court of Appeals for the Ninth Circuit

No. 21183

SOUTHWESTERN CABLE COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

No. 21192

MISSION CABLE TV, INC., PACIFIC VIDEO CABLE COMPANY AND TRANS-VIDEO CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA AND FEDERAL COMMUNICATIONS COMMISSION, RESPONDENTS; JACK O. GROSS, ET AL., INTERVENORS

Before BARNES and ELY, Circuit Judges, and PECKHAM, District Judge.

DECREE

These causes came on to be heard upon the petitions of Southwest Cable Company and Mission Cable TV, Inc., Pacific Video Cable Company and Trans-Video Corporation, to review a memorandum opinion and order of the Federal Communications Commission issued by it on July 25, 1966, with an erratum issued on July 26, 1966.

The court heard argument of respective counsel on January 10, 1967, and has considered the briefs and transcript of record filed in these causes. On April 28, 1967, the court being fully advised in the premises handed down its opinion in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the memorandum opinion and order of July 25, 1966, of the said Federal Communications Commission is vacated and set aside to the extent that it limits the operations of the petitioners as set forth in paragraphs 24–26 of that order.

APPENDIX C

Before the Federal Communications Commission,
Washington, D.C.

Docket No. 16786

IN THE MATTER OF THE PETITION OF MIDWEST TELEVISION, INC. (KFMB–TV), SAN DIEGO, CALIFORNIA, FOR IMMEDIATE TEMPORARY AND FOR PERMANENT RELIEF AGAINST EXTENSIONS OF SERVICE OF CATV SYSTEMS CARRYING SIGNALS OF LOS ANGELES STATIONS INTO THE SAN DIEGO, AREA, PETITIONER

v.

MISSION CABLE TV, INC., EL CAJON, CALIFORNIA, SOUTHWESTERN CABLE CO., SAN DIEGO, CALIFORNIA, PACIFIC VIDEO CABLE CO., INC., EL CAJON, CALIFORNIA, TRANS-VIDEO CORP., EL CAJON, CALIFORNIA, RANCHO BERNARDO ANTENNA SYSTEMS, INC., LA JOLLA, CALIFORNIA, AND POWAY CABLE TV, POWAY, CALIFORNIA, RESPONDENTS

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners BARTLEY and LOEVINGER dissenting; Commissioner JOHNSON not participating.

1. The Commission has before it for consideration a petition filed on March 17, 1966, by Midwest Television, Inc. (Midwest), licensee of KFMB–TV, San Diego, California, a supplement thereto filed on April 4, 1966, and responsive pleadings in connection there-

with.[1] The petition was filed pursuant to Section 74.1107 and 74.1109 of the Commission's Rules, adopted March 8, 1966, effective March 17, 1966 (31 F.R. 4540)[2], and requests basically that the Commission immediately order respondents, pending final disposition of the petition, to cease and desist from extend-

[1] The following responsive pleadings have also been filed and considered: Comments of Jack O. Gross, (Gross) permittee of Station KJOG–TV, San Diego, filed on April 15, 1966; Opposition to petition and supplement filed by Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp. (hereafter collectively referred to as Mission) on April 18, 1966; Opposition to petition and supplement filed by Southwestern Cable Co. (Southwestern) on April 18, 1966; a Statement of Position filed by Southwestern on April 18, 1966; a Motion to Sever filed by Southwestern on April 18, 1966; a Motion to Dismiss filed by Southwestern on April 18, 1966; an Opposition and Petition to be Dismissed filed by Rancho Bernardo Antenna System (Rancho) on April 18, 1966; a Reply of Petitioner to Opposition to petition for immediate temporary relief and Answer to Motion to Dismiss petition for immediate temporary relief filed by Midwest on April 25, 1966; an Answer to Motion to Sever filed by Midwest on April 25, 1966; a Reply of Petitioner to Oppositions to petition for permanent relief and Answer to Motions to Dismiss petition for permanent relief filed by Midwest on May 2, 1966; and a Reply to Answers of Midwest to Motions to Sever and Dismiss filed by Southwestern on May 5, 1966. Additional interlocutory pleadings concerning extensions of time were filed and have been acted upon, pursuant to delegated authority. On April 6, 1966, Poway Cable TV filed a motion asking that it be dismissed as a party respondent; Midwest filed an answer stating that in view of the agreement reached, it would be appropriate to dismiss Poway as a party. We will grant this request.

[2] Section 74.1107 of the Commission's Rules relates to CATV systems operating or proposing to operate in one of the top 100 television markets and carrying distant television stations' signals. Section 74.1109 of the Rules relates to the filing of petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes.

ing service to additional subscribers served by their respective systems within the Grade A contours of the San Diego stations and, after any necessary hearing, issue a final order appropriately confining carriage of Los Angeles television signals by respondents' San Diego area systems. In its later pleadings, Midwest modified its initial request for temporary relief to a request that respondents be directed not to extend the Los Angeles television signals to subscribers beyond the specific geographic boundaries of areas in which subscribers were being served on February 15, 1966.

2. In support of its requests for relief, Midwest states that respondents are the holders of franchises to operate CATV systems issued by the cities of San Diego, Chula Vista, National City, La Mesa, Imperial Beach, El Cajon, and San Diego County.[3] The City of San Diego has a population of approximately 648,500 occupying 208,631 housing units and the County of San Diego has a population of approximately 1,213,000 occupying 379,483 housing units; nearly all of the county population lies within the Grade A contour of KFMB–TV and San Diego is ranked by the American Research Bureau as the 54th market based on net weekly circulation. San Diego is presently served by five television stations, a construction permit has been issued for Channel 51 (KJOG), an application is pending for Channel 15, and the assignment of an additional UHF commercial channel to San Diego is under consideration in Docket No. 14229. Midwest alleges that respondents' CATV systems carry the signals of between six and nine Los Angeles television

[3] Trans-Video is 100% owner of Pacific Video, majority owner of Mission Cable and has a minority interest in Southwestern. It has no franchises and is a management company. Trans-Video operates under contract the CATV systems owned by and franchised to Mission, Southwestern and Pacific.

stations none of which stations provide measured or calculated Grade B service to more than the northern portion of the city of San Diego nor to any parts of six other separate communities adjacent to the city; that all of Mission's systems except Poway supply regularly eight Los Angeles stations beyond their calculated Grade B contours (Mission's Poway system carries three beyond Grade B signals and the independent Poway system carries two); that neither Poway nor Rancho Bernardo receive actual Grade B service from any Los Angeles stations; and that Southwestern supplies regularly to all of its subscribers at least three Los Angeles stations beyond their calculated Grade B contours.

3. Midwest goes on to allege that within the past year, and increasingly in recent months and weeks, there has been "widespread and intensive CATV activity within KFMB–TV's Grade A contour" and that service to Poway, Chula Vista and Pacific Beach was instituted only two to four months prior to the filing of the petition. It is alleged that the other systems have greatly extended their lines and substantially increased the number of subscribers since April of 1965; that the systems have increasingly emphasized the laying of lines, far outstripping the solicitation and hooking up of new subscribers; with cables being strung in some areas for miles with very few drops and in some cases none; and in those communities where the systems are operational or wired, only portions of such communities are involved. Midwest estimates that as of February 15, 1966, there were 17,000 homes in the county and within the station's Grade A contour connected to cable systems, of which approximately 6,500 were located in the city; that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are at present approximately

294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and this figure represents approximately 78% of all homes in the county within the Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are alleged to be in areas covered by CATV franchises. Because of the alleged emphasis on line extensions rather than on hook-ups, Midwest contends that a large number of new subscribers could be wired up in a relatively short time even if there were no further cable expansion.

4. Midwest contends that the importation of a multiplicity of distant signals will, if allowed to expand, fragment and drastically reduce the local stations' viewing audience notwithstanding the non-duplication rules. Midwest points out that in its case, 44% of its programming is non-network and will be subject to duplication and that, with respect to the San Diego independent stations, nearly 100% of their programming will be subject to duplication; that virtually all of the non-network recorded programs now under contract to the San Diego stations are also under contract or available to the Los Angeles stations; that the importation of such programs impairs their value to the San Diego stations and causes audience losses, eventually resulting in reduced advertising revenues and curtailed local and quality programming; that over 94% of the Los Angeles programs carried on the respondents' systems in a given week have been, are being, or will be duplicated on San Diego stations in the same form or by way of San Diego equivalents; and analysis of the remaining 6% indicates that the same public interest is or would be served in an alternate way by the San Diego stations.

5. Midwest also alleges that respondents' systems,

with the exception of Poway Cable TV, carry the signal of KFMB–TV on channel but materially degrade the quality of the signal broadcast, particularly the color signals; that the signal of the local UHF station, KAAR, is markedly worse on the cable than those of the VHF stations; that the signals of the Los Angeles stations appear better on the cable than those of the local stations despite the fact that the Los Angeles stations generally do not place a Grade B signal over San Diego; and that the effect of degradation has been not only to damage the local station's reputations but has placed the distant signals on a higher competitive level than the local signals.[4] Finally, Midwest contends that in addition to the foregoing considerations, the CATV situation in San Diego falls squarely within the principle enunciated in the *Second Report* in footnote 69, where the Commission pointed out that, although, in general, CATV activity which does not involve extension of a signal beyond its Grade B contour may continue, an important exception exists where two major markets fall within one another's Grade B contours. In such a situation, the carriage by a CATV system in Baltimore, for instance, of the Washington signals might equalize the quality of the distant signals, change the viewing habits of the local population and affect the development of local television stations. Midwest contends that the San Diego-Los Angeles situation is a classic illustration of this problem and that relief should be afforded on this basis as well as the basis previously set forth.

[4] Midwest states that because of degradation, the Pacific Beach system carries KFMB–TV on Channels 8 and 2, but that this dual carriage confuses the public, weakens its station identification and causes possible ratings losses.

6. In view of the above, Midwest requests, essentially, that the Commission issue a final order appropriately confining carriage of Los Angeles signals by respondents' systems and that, if a hearing is necessary, the respondent be ordered to confine delivery of the Los Angeles signals to subscribers located within the specific geographic boundaries inside of the general geographic areas where the systems were operating on February 15, 1966.[5] In a document filed on April 15, 1966, Jack O. Gross, holder of a construction permit for UHF station KJOG–TV, Channel 51, San Diego, supports the Midwest petition and states that a grant of the requested relief would materially contribute to the success of UHF in San Diego generally and KJOG in particular.

7. Mission's opposition, filed on behalf of Mission, Pacific and Trans-Video, contends that the Commission can only issue temporary relief in accordance with the provision of Section 312 of the Communications Act (47 U.S.C. 312(c)) and that there is no statutory authority for the type of relief requested. Mission contends that such relief is analogous to a motion for stay and that, as such, it is inadequate be-

[5] In support of its request for temporary relief pending the outcome of any hearing, and in an attempt to describe the extent of respondents' operations in San Diego and southwestern San Diego county as of February 15, 1966, Midwest filed a Supplement to its petition, to which it attached a map purporting to show that there were eight separate islands of CATV subscriber service as of February 15, 1966 located in recognized geographical areas in San Diego which were further circumscribed by recognizable and known geographical limitations and boundaries within the larger geographical areas. In the Supplement, Midwest alleges that since February 15, 1966, the respondents have extended lines and service beyond the specific boundaries within the general areas and also into entirely new geographic areas.

cause Midwest has failed to show irreparable injury to itself (Mission contends that Midwest's allegations in this regard are only conclusionary and not supported by material facts); has failed to demonstrate injury to the public (Mission contends that allegations in this regard are also conclusionary and highly speculative and denies that there is any degradation of the San Diego stations' signals by the CATV systems); and has not demonstrated that there is a likelihood that it will succeed on the merits (Mission contends that Midwest's allegations relating to a "pell-mell" extension of cable lines are completely unsupported by facts, is untrue, and that respondents have merely continued their normal wiring activity).

8. Mission alleges further that there is nothing in the rules which prohibits the actions of respondents which Midwest seeks to prevent since the rules speak of extension of signals to "new geographic areas" and Midwest has not factually supported its allegation that there has been such an extension. Further, Mission contends, Midwest has failed to show that the signals extended are beyond predicted Grade B and it is Mission's position, in any event, that its Poway system is "grandfathered" under the rules since it was franchised under the San Diego county franchise; service had commenced prior to March 17, 1966, and the county-wide franchise authorized CATV at any place in San Diego county outside of corporate limits.[6] Mission states that the outside-of-corporate

[6] Midwest had alleged, in its petition, that Mission's system in Poway had commenced operations after February 15, 1966 in violation of Section 74.1107 of the Rules, and requested that the Commission issue a cease and desist order as to said system. On April 6, 1966, after an independent inquiry, the Commission issued an Order to Show Cause why a cease and desist order should not be issued with respect to the Poway operation. FCC

limits construction in San Diego has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Finally, Mission alleges, with respect to the request for temporary relief, that the public will be irreparably injured since it ignores the need for expansion of television service, prevents expansion of educational television, deprives the public of improved color reception, municipalities of revenues from CATV and potential subscribers of the same choice of programs that their neighbors who have already subscribed have; that respondents will be irreparably injured since their franchises may be forefeited if construction is delayed, contract rights may be lost, and respondents' employees may lose their jobs; the Commission's Rules are yet untested and are probably illegal; and the rights of Midwest or the public can be fully protected by a decision on the merits, after a hearing, if the Commission determines that any action is required.

9. As to Midwest's request for permanent relief, Mission incorporates its same arguments with respect to the request for temporary relief and contends further that its franchises were obtained before the Commission decided to exercise jurisdiction and that construction and installation of cable was started before February 15, 1966 or March 17, 1966. Additionally, Mission alleges that while CATV is a less expensive and more convenient type of antenna service for signals already present in San Diego, CATV is needed in certain areas in order to provide adequate reception of San Diego Channel's 8 and 10 and that

---

66-292, April 6, 1966. On June 22, 1966, the Commission issued a Cease and Desist Order as to Mission's Poway system. FCC 66-548,

CATV expansion is necessary for the acceptance and viability of UHF stations. Mission points out that since the San Diego stations' programs can not be duplicated on the same day and surveys show that during prime time the San Diego stations have 84% of the viewing audience, it does not appear that fragmentation of the remaining 16 to 20% of the television audience, among the four or five Los Angeles independents and the San Diego UHF, could have any serious impact on the ability of the San Diego network stations to continue their operations. Finally, Mission contends that the addition of subscribers to its systems after February 15, 1966, does not constitute extensions to new geographical areas since, under its city franchises, the appropriate geographic boundaries are the city limits and, under its county franchises, the appropriate boundaries are the unincorporated areas of the county.[7] In view of all of the above, Mission requests that Midwest's petition, both as to temporary and permanent relief, be denied.

10. Southwestern filed an Opposition, a Motion to Sever, and a Motion to Dismiss.[8] In its pleadings, Southwestern alleges that the petition must fail since Midwest has failed to show that its system is carrying beyond Grade B signals and that Southwestern's engineering studies show that the commercial television signals which it is carrying are all of Grade B intensity. Southwestern further contends that its sys-

[7] Mission submitted a map with its opposition showing the area of each franchise; the portion of each franchise receiving service prior to February 15, 1966; the portion of each franchise receiving service after February 15, 1966; and the portion of each franchise which was "fielded" and/or under construction as of April 12, 1966.

[8] Southwestern also filed a Statement of Position which is being treated in connection with the petitions for reconsideration of the Second Report and Order.

tem is "grandfathered" since it began operating prior to February 15, 1966, is not expanding throughout the entire community or into new areas, and has only continued normal wiring operations. Moreover, Southwestern alleges that its system helps UHF and that while Midwest has submitted no probative data regarding impact, Southwestern's market study, a copy of which it attached as an exhibit to its opposition, shows that CATV helps UHF generally and Channel 39 specifically since carriage of the UHF station on the cable increases the station's audience, improves its picture quality, and provides greater penetration for, and viewing frequency of the station. Southwestern also points out that Midwest's claim of signal degradation does not relate to its system since it has always carried Midwest's station on channels 8 and 2 of the cable. Southwestern also claims that its franchise area is unique since the residents and antennas in that area are oriented to the Los Angeles stations and since it is within the predicted or measured Grade B contours of the commercial signals of the stations carried on its system. Southwestern contends that Midwest's showing of fragmentation has no applicability to its system since the survey was conducted in a part of San Diego where the off-the-air reception of the Los Angeles stations is of less quality, the survey was conducted prior to the commencement of service by Southwestern and the various sections of San Diego vary significantly, and the audience survey findings relate to areas of San Diego where the CATV systems carry the full schedules of the Los Angeles CBS and NBC stations while Southwestern's system carries only the San Diego CBS and NBC stations. Finally, Southwestern alleges that while Midwest has failed to show that it would be irreparably injured by denial of the temporary relief, Southwestern would

269-328 O - 67 : 4

suffer irreparable injury since a grant of temporary relief would dry up Southwestern's financing and cause bankruptcy. As to the request for permanent relief, Southwestern contends that while Midwest has essentially requested the Commission to designate a "Carroll" type issue, it has completely failed to furnish detailed evidentiary material. Accordingly, Southwestern requests that it be severed from the other respondents and that the petition and supplement, insofar as they relate to it, be denied or dismissed.

11. Rancho Bernardo, in its opposition, states that it operates a system in northern San Diego under a franchise from the city of San Diego and that the system is part of a housing development of 5,400 acres, approximately 400 acres of which have been developed. The system is designed to serve only the residential community and there is no intention of extending beyond those boundaries. Rancho Bernardo states that there are now approximately 1,000 subscribers to the system or 99% of the occupied housing units and service is expanding in an orderly fashion to serve all the new residential units with the timing of service extension being determined solely by the sales of residential units. Rancho Bernardo contends that the area receives unsatisfactory off-the-air television reception, is not within the Grade A contour of KFMB–TV, and may be within the Grade B contours of some Los Angeles stations. Rancho Bernardo denies that it degrades the KFMB signal and alleges that a grant of temporary relief would irreparably injure it because it would impede the sales of homes and would not help KFMB since it would make its signal unavailable in the area. Rancho Bernardo requests denial of the temporary and permanent relief and asks that it be dismissed from the proceedings.

12. In its responsive pleadings, Midwest points out that there is no factual dispute as to Mission's and Southwestern's intentions to continue expansion throughout the various geographic areas covered by their franchises. Midwest contends that temporary relief is necessary to prevent this great expansion of these major market systems until resolution of the public interest questions presented. Midwest alleges that, similarly, with limited exceptions, there is no real dispute as to the regional and specific geographic areas described by it; that since respondents have not wired up all of the homes within the specific geographic areas designated, restriction to such areas, *pendente lite,* would not prevent normal wiring operations; and that, therefore, there is no showing by respondents that an interim stay would impair the ability of the systems to continue operations. Midwest alleges that Mission makes no claim that its viability would be impaired and that Southwestern's claim of irreparable injury assumes a total prohibition against new subscribers; Southwestern does not claim that if it were limited to new subscribers within the specific geographic areas designated as of February 15, 1966, it would be irreparably injured.

13. Specifically, with respect to Mission, Midwest alleges that it has offered no factual information to refute the allegations of rapid line expansion; that Mission's map, in large part, confirms the boundaries specified by Midwest and, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966; that Mission's arguments regarding need for CATV service are invalid because 1) the entire public will lose if the local stations are forced off the air or required to curtail operations and 2) over 94% of the Los Angeles stations' programs have been, are, or will be essen-

tially duplicated by the programming of the San Diego stations; and that irreparable injury to Mission's systems has not been demonstrated since 1) there has been no showing that Mission's systems were not viable as of February 15, 1966, 2) there has been no showing that its franchises or contracts *will* expire or be forfeited if interim relief is granted (Midwest points out that the franchises do not require carriage of the Los Angeles stations and that the systems could expand without restriction carrying only San Diego signals); and 3) employee lay-off would occur only if respondents were ordered to halt all normal wiring and hook-up of new subscribers, but this has not been requested. Mission's county-wide grandfathering argument, contends Midwest, completely ignores the meaning of paragraph 149 of the Second Report and Order.

14. Midwest alleges, in response, that Southwestern does not challenge Midwest's designation of appropriate geographic areas and that since there are thousands of residents in these areas not yet on the cable, a grant of temporary relief as to Southwestern would not halt its normal wiring activities (Southwestern claims about 900 subscribers at present). Further, Midwest alleges, Southwestern's argument as to being "grandfathered" in the entire franchised area, because it was serving 350 subscribers on February 15, 1966, completely ignores the import of the Second Report and Order; Southwestern's attempt to show that its franchised area receives Grade B signals from Los Angeles is completely inadequate from an engineering standpoint and its market survey techniques are defective and its conclusions unsupported.[9] Finally, Midwest contends that while South-

[9] Midwest points out that while cable subscribers interviewed had two UHF stations available to them (Channel 28, Los

western's allegations concerning impact relate to the short run benefits to UHF of carriage on CATV, these benefits decrease as penetration of all-channel receivers increases and that Southwestern has set forth no basis for being treated differently than the other respondents in this proceeding.[10] As to Rancho Bernardo, Midwest states that in light of the representations as to extension Midwest will not press its request for temporary relief. However, Midwest contends that no basis has been shown for dismissal of Rancho Bernardo from the proceeding; that dismissal of Rancho Bernardo would have the effect of grandfathering an area 1350% larger than the area in which service is presently being rendered; and that no allegation has been made that Rancho Bernardo's participation would constitute a hardship to it or cause it damage.

15. With respect to its request for permanent relief, Midwest states that the real issue is whether CATV should be allowed to import distant signals which would result in impairing the service capabili-

---

Angeles, and 39, San Diego) the Los Angeles UHF is not available off the air, and the survey only proves, at most, that viewers with two available UHF stations to watch, will view UHF 1.77 times as much as viewers with one, and that, if UHF viewing by cable subscribers is divided equally between the two stations, Channel 39 is viewed 11% fewer times in cable homes than in non-cable homes. Midwest also pointed out that the survey proved nothing as to reception quality on cable since no distinction was made between Channels 28 and 39 and it was not determined whether the non-cable homes surveyed had UHF antennas.

[10] Southwestern, in its responsive pleadings, repeats its allegations that its franchise area does receive Grade B signals from Los Angeles and that its system does not degrade the signals of KFMB–TV. It also attached a supplementary economic report purporting to show that CATV carriage does help UHF generally and Channel 39 specifically.

ties of network stations and threaten the continued existence or commencement of UHF stations; that carriage provides only short-run benefits to UHF stations; and that same-day non-duplication is insufficient because it has little relevance to non-network programs. In conclusion, Midwest requests that the Commission set the matter for hearing on the issues raised in the petition for permanent relief; that pending final disposition, the respondents be directed not to extend the Los Angeles stations' signals beyond the boundaries previously specified; and that Southwestern's motion to dismiss the petition for temporary relief and Rancho Bernardo's petition to be dismissed from the proceeding be denied.

16. We think Midwest has presented a classic case for a hearing with respect to the general issues of expansion of respondents' CATV systems throughout the San Diego market area. At paragraph 149 of the Second Report and Order (2 F.C.C. 2d 725), after stating our policy with respect to "grandfathering" the existing operations of CATV systems, we stated:

> We turn now to the question whether systems extending signals beyond their Grade B contour on February 15, 1966, into one of the top 100 markets, are to continue to add subscribers in new geographic areas. Such systems, which may recently have gone into operation without regard to the Commission's explicit notice of the pendency of the paragraph 50 proposal, may have relatively few subscribers. In view of the public interest considerations upon which our policy is based, we do not believe that such a system should be allowed to expand from a few thousand subscribers in one part or suburb of a community to the potential of hundreds of thousands throughout the entire community, until there has been resolution of the serious issues presented (in

an evidentiary hearing). While there may be a disruptive factor in halting CATV growth in the particular circumstances which should, of course, be taken into account, we believe that if at all practicable, appropriate geographical areas should be delineated, with the CATV growth limited to such areas until resolution of the issues. The problem calls for case-by-case judgment in the particular community as to the feasibility of action along the foregoing lines and the appropriate geographical area or areas. Our judgment will therefore be made upon the petition, if any, of the local broadcaster(s) objecting to the geographical extension of the CATV system to new areas, and responses thereto. The petition may also request temporary relief in the event an evidentiary hearing is found to be appropriate; the Commission will determine, upon the basis of the showing and response in the particular case, whether such temporary relief is called for, and if so, its nature.

This case falls squarely within the terms of the policy stated above. There is considerable UHF activity currently under way in San Diego with KAAR (ch. 39) in operation until November, 1965, with an application pending for educational Channel 15, with an outstanding construction permit for Channel 51 (KJOG–TV) and plans to commence operation in the near future. Several of Mission's systems, and Southwestern's system, commenced operations only some two to four months prior to the filing of the petition herein. In view of the size of the area involved (approximately 380,000 housing units in San Diego County), while the respondents' systems have relatively few subscribers, pursuant to their franchises, they have the potential for expanding throughout the entire county.

17. In this latter connection, Midwest has pointed out, and respondents have not denied, that there were

on February 15, 1966, approximately 17,000 CATV subscribers in the county and within KFMB–TV's Grade A contour, of which approximately 6,500 were located in San Diego. It was further pointed out that while this constitutes only 4.6% of the county homes within the station's Grade A contour, there are approximately 294,000 homes in the communities within this contour in which CATV systems carrying Los Angeles signals have begun to operate and that this represents approximately 78% of all homes in the county within the station's Grade A contour. Approximately 90% of all homes in the county within the station's Grade A contour are located in areas covered by CATV franchises. Mission states that construction in unincorporated communities in San Diego County has proceeded to the point where approximately 70% of the populated area adjacent to metropolitan San Diego has been wired and 30% of the homes in the wired area have subscribed. Thus, it clearly appears that a hearing is required with respect to the over-all question of whether such potential expansion in this major market is consistent with the public interest. Further, unless this expansion is appropriately limited pending resolution of the issues, within a very short period of time the systems could wire up thousands of new subscribers. We have made clear in the Second Report the impracticability of withdrawing service, once established, because of its disruptive effect. We have also made clear the strong public interest considerations which should be resolved before the establishment or entrenchment of CATV substantially throughout an area such as San Diego is permitted. Accordingly, interim relief appropriately limiting further expansion until resolution of the public interest issues is called for.

18. A hearing is also appropriate here because of

the number of unresolved issues present. For instance, there is disagreement as to whether some of respondents' systems are operating within the predicted Grade A contour of KFMB–TV; there is controversy as to whether some of the respondents' systems operate within the Grade B contour of some of the Los Angeles stations carried on the system (but in this respect, see also par. 19, *infra.*); there is a serious question as to whether respondents' systems degrade the San Diego signals carried and particularly the signals of KFMB–TV; the degree of CATV penetration of the market is contested; and, of course, there is controversy as to whether carriage on the systems will help or hurt new or prospective UHF stations in San Diego. These issues are all particularly appropriate for resolution in an evidentiary hearing. We wish to stress that, in view of the importance and novelty of the matters raised, we think considerable latitude should be afforded as to the introduction of evidence on all of these matters.

19. Some of the respondents have alleged that since their systems operate within the predicted or measured Grade B contours of the Los Angeles stations carried on their systems, the provisions of paragraph 149 of the Second Report, *supra,* which relate generally to extension of beyond Grade B signals, do not apply to their systems and that they may, therefore, continue to expand without hindrance. This contention, however, misconceives the main thrust of our major market policy. The Commission's primary concern with respect to CATV operations in the major markets importing distant television signals was whether such operation "may be of such nature or significance as to have an adverse economic impact upon the establishment or maintenance of UHF stations or to require these stations to face substantial

competition of a patently unfair nature" (Second Report, Paragraph 139). We defined "distant signals" as those signals extended or received beyond the Grade B contours of those stations. While this standard will generally encompass our main area of concern (i.e., the importation of signals not allocated to the area), it is by no means a fixed and immutable standard to which we will blindly adhere. As we pointed out in the Second Report, CATV activity which does not involve extension of a signal beyond the Grade B contour may continue, "* * * with possibly only the rarest exception * * *." (Second Report, paragraph 151). This exception involves a situation where, for instance, two major markets fall within one another's Grade B contours and the importation of signals of the stations in one market into the other would equalize the quality of the distant signals, possibly change the viewing habits of the latter community and affect the development of independent UHF stations there. Assuming, *arguendo,* as respondents contend, that their systems are within the predicted or measured Grade B contours of the Los Angeles stations, this is exactly the situation presented here. The Los Angeles stations are located more than 100 miles from the San Diego main Post Office and, while they may provide service to some parts of San Diego, the issue is what kind of service as compared to that of the local San Diego stations, and what is the effect on the latter of CATV which "equalizes" the technical quality of the local San Diego signals and the more than 100 mile distant Los Angeles stations. Thus, the problem is not resolved merely by a showing that the Los Angeles stations do provide Grade B signals to parts of San Diego County.

20. It is clear, therefore, that a hearing is necessary with respect to the overall question of CATV expan-

sion in this major market and that some form of temporary relief is necessary and appropriate "before consequences possibly adverse to the public may develop." Before discussing the nature and form of the temporary relief to be prescribed, there are three matters raised by respondents which we will briefly discuss.

21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform "any and all acts, make such rules and regulations, and issue such orders, not inconsistent with [the] Act, as may be necessary in the execution of [our] functions." Section 4(i). See also Sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the

authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission,* 327 F. 2d 893, 896–897 (C.A.D.C., 1964).

president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, *pendente lite,* if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they

Insert the following between the paragraph ending "1964).", and the paragraph beginning with the word "president."

Second, respondents Mission and Southwest contend that their systems are grandfathered to the limits of their franchises. We reject this position, since it is totally inconsistent with the policy expressed in paragraph 149 of the second report (see, also Letter to Telerama, Inc., 3 FCC 2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury.[11] Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice

[11] Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if some form of temporary relief is ordered.[12] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration.

22. The question now is the nature and form of the temporary relief to be afforded. In its petition, and particularly the supplement thereto, Midwest specified with great particularity and precision "eight separate and discrete islands of CATV subscriber service as of February 15, 1966," alleging that these "islands" were located in recognized geographical areas in San Diego and that the islands were further circumscribed by recognizable and known geographical areas. These latter areas were also described with great precision and it was alleged that from the eight islands, as they existed on February 15, 1966, the respondents have extended and are continuing to extend their lines and service beyond the boundaries within the geographical areas which they partially occupied and, also, into new geographical areas. Midwest asks essentially, that pending final disposition, respondents be ordered to confine delivery of Los Angeles signals to subscribers located within the geographical boundaries inside of the eight general area which circumscribe the areas

[12] We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

where the systems were operating on February 15, 1966.[13]

23. Neither Mission nor Southwestern has factually challenged Midwest's description and specification of the geographic areas and their boundaries. Rather, they take the position that their franchise areas constitute the appropriate geographic limitations. We have, however, rejected this contention (see paragraph 21, *supra*). Mission, with its opposition, submitted a detailed map which, in part, indicates for the entire area where systems were operating on February 15, 1966. Midwest states in its reply that the map, in large part, confirms the boundaries specified by it in its supplement and that, with one exception, Midwest will accept it as showing where Mission's systems were operating on February 15, 1966. We have also reviewed the map and compared it with the specific boundaries detailed in Midwest's supplement and it appears that, with the exception of the Chula Vista area, the parties are largely in agreement as to the boundaries of the areas where Mission was operating on Februry 15, 1966.

24. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Mission to confine delivery of the Los Angeles signals carried on its systems to subscribers within those areas where Mission indicated in its map (appended as attachment G to its opposition) it was operating on February 15, 1966. We will also accept Mission's map designation with respect to the Chula Vista area, provided, however, that our

[13] Midwest has indicated in a subsequent pleading that it does not object to dismissing Poway Cable TV from the proceeding and that it is not pressing its request for temporary relief as to Rancho Bernardo. Accordingly, we are only concerned with framing temporary relief as to Mission's and Southwestern's systems.

action with respect to Chula Vista is without prejudice to any further showing Midwest may present to support its position as to the geographic boundaries, as of February 15, 1966, of the area served by Mission's Chula Vista system. Upon an appropriate showing, we will give further consideration to Midwest's request to further restrict the Chula Vista system pending final disposition of this proceeding.

25. As to Southwestern, we have previously noted that it has not challenged Midwest's designation of the general and specific areas within which it was operating on February 15, 1966. Accordingly, we will grant temporary relief, pending final disposition of this proceeding, in the form of an order requiring Southwestern to confine delivery of the Los Angeles signals carried on its system to subscribers within those areas specified by Midwest in its supplemental petition (paragraphs (A)(1) and (B)(1), pages 10 and 12, respectively, and affidavit, paragraph 5(1), pages 2 and 3), appended thereto. This action will be subject to any further showing Southwestern may wish to present to show that the geographic boundaries of the area in which it was operating as of February 15, 1966, differ from these specified by Midwest. Upon an appropriate showing and request, we will give further consideration to the question of appropriate February 15, 1966, boundaries of Southwestern's systems.

26. It should be noted with respect to the temporary relief described above that both Mission and Southwestern are free to continue to construct lines and add new subscribers and to carry the Los Angeles signals within the specific geographic areas described above. As indicated, it would appear that there are substantial numbers of potential new subscribers located in those areas. Further, Mission and Southwest-

ern may continue to expand their systems within their franchised areas so long as the expansion is confined to the carriage of the San Diego-Tijuana signals. And, finally, respondents may continue their present service to any persons who began receiving service, or who had signed and submitted an accepted subscription request, between February 15, 1966, and the date of this order. As indicated in the Second Report, we have no desire to cause disruption of existing service and we do not, in any event, believe that a roll back is either practical or necessary. While we recognize that the temporary relief which we are ordering may, to some extent, discommode respondents' operations, we do not think that it will cause respondents either substantial hardship or irreparable injury. To the extent that there is some disruption of existing operations and future plans, we find that it is necessary in the public interest.

27. Accordingly, in view of the above, and pursuant to Sections 74.1109 and 74.1107(a) and (d) of the Commission's Rules, IT IS ORDERED, that this proceeding is hereby DESIGNATED FOR HEARING, at a time and place to be specified in a further order, upon the following issues:

1. To determine the locations of trunk and feeder lines (both energized and unenergized) and the location and number of subscribers per half mile (or other comparable convenient unit of measure) or cable to respondents' respective CATV systems as of February 15, 1966, March 17, 1966 and the date of this order, and the locations of the predicted Grade A contours of the San Diego television stations and predicted Grade B contours of the Los Angeles television stations.

2. To determine whether the signals of any of

the San Diego television stations are degraded on any of respondents' respective CATV systems and, if so, the cause, extent and nature thereof.

3. To determine the present actions and plans for the future of respondents with respect to the initiation of pay-TV operations based upon or in connection with their respective CATV operations.

4. To determine the present penetration of CATV service by CATV systems in the San Diego market area and the potential penetration of CATV service under conditions of unlimited expansion.

5. To determine the effects on the audiences of existing, proposed, and potential San Diego television stations of present penetration and of potential penetration under conditions of unlimited CATV expansion.

6. To determine the effects of present service and of unlimited expansion of service by CATV systems, generally, on off-the-air television service from the San Diego television stations and, particularly, on existing, proposed and potential UHF television service in the area.

7. To determine whether any conditions of future imports should be placed on the present operations of respondents' CATV systems and, if so, the nature thereof.

8. To determine whether expansion of any of respondents' CATV systems should be limited and, if so, the appropriate conditions thereof.

9. To determine, in light of the foregoing, whether respondents' present or planned CATV operations are consistent with the public interest and what, if any, action should be taken by the Commission.

389-328 O - 67 - 5

It is further ordered, that Midwest Television, Inc. the Chief, Broadcast Bureau, Mission Cable TV, Inc., Southwestern Cable Company, Pacific Video Cable Company, Inc., Trans-Video Corp., Rancho Bernardo Antenna Systems, Inc., and Jack O. Gross, are made parties to this proceeding.

It is further ordered, that respondents have the burden of proceeding and the burden of proof with respect to issue 1; that with respect to issue 2, petitioners have the burden of proceeding and the burden of proof; that respondents have the burden of proceeding and the burden of proof with respect to issue 3; that respondents have the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to respondents' respective CATV systems, and that petitioner has the burden of proceeding and the burden of proof with respect to issue 4 insofar as it relates to CATV systems other than those of respondents; that petitioner has the burden of proceeding and the burden of proof with respect to issues 5 thru 8.

It is further ordered, that pending the outcome of this proceeding, respondents Mission Cable Television, Inc., Southwestern Cable Company, Pacific Video Cable Co., Inc., and Trans-Video Corp. are directed to limit the operations of their respective CATV systems as set forth in paragraphs 24–26, *supra*.

It is further ordered, that the Motion to Dismiss filed by Poway Cable Television is granted and it is dismissed as a party to this proceeding.

It is further ordered, that the Motion to Sever and the Motion to Dismiss filed by Southwestern Cable Co. and the Petition to be Dismissed filed by Rancho Bernardo Antenna Systems, Inc., are denied.

It is further ordered, that the request for oral argument of Mission Cable Television, Inc., Pacific Video Cable Co., Inc. and Trans-Video Corp. is denied.

It is further ordered, that the petition filed by Midwest Television, Inc., and the supplement thereto, to the extent indicated above, is granted, and, in all other respects, is denied.

It is further ordered, that, to avail themselves of the opportunity to be heard, the parties herein, pursuant to Section 1.221 (e) of the Commission's Rules, in person or by attorney, shall, within twenty (20) days of the mailing of this Order, file with the Commission in triplicate a written appearance stating their intention to appear on the date set for the hearing and present evidence on the issues specified in this Order.

It is further ordered, that the ruling as to temporary relief shall be effective on the 3rd day, not counting Saturdays, Sundays and holidays, after the day of release of this opinion, provided that, the ruling on temporary relief shall not be effective until judicial determination of the motion for a stay in the case of any respondent which notifies the Commission within two days that it intends to seek judicial review and which seeks judicial review and a judicial stay within 14 days of the day of release of this opinion.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

Adopted: July 20, 1966.
Released: July 25, 1966.

Before the Federal Communications Commission,
Washington, D.C.

Docket No. 16786

IN THE MATTER OF THE PETITION OF MIDWEST TELEVISION, INC. (KFMB–TV), SAN DIEGO, CALIFORNIA, FOR IMMEDIATE TEMPORARY AND FOR PERMANENT RELIEF AGAINST EXTENSIONS OF SERVICE OF CATV SYSTEMS CARRYING SIGNALS OF LOS ANGELES STATIONS INTO THE SAN DIEGO, AREA, PETITIONER

v.

MISSION CABLE TV, INC., EL CAJON, CALIFORNIA, SOUTHWESTERN CABLE CO., SAN DIEGO, CALIFORNIA, PACIFIC VIDEO CABLE CO., INC., EL CAJON, CALIFORNIA, TRANS-VIDEO CORP., EL CAJON, CALIFORNIA, RANCHO BERNARDO ANTENNA SYSTEMS, INC., LA JOLLA, CALIFORNIA, AND POWAY CABLE TV, POWAY, CALIFORNIA, RESPONDENTS

ERRATUM

In the Commission's Memorandum Opinion and Order in the above-entitled proceeding, released July 25, 1966, FCC 66-683, 86406, paragraph 21 is corrected to read as follows:

"21. First, respondents Mission and Southwestern contend that the Commission lacks authority to furnish the temporary relief requested by Midwest, primarily on the ground that the cease and desist provisions of Section 312 of the Communications Act constitute the only basis for any sort of interim action pending a hearing. However, we have determined in the Second Report that we have jurisdiction over CATV systems, and the statute gives us authority to perform 'any and all acts, make such rules and regulations, and issue such orders, not inconsistent with

[the] Act, as may be necessary in the execution of [our] functions.' Section 4(i). See also Sections 303 (f) and (r). The provisions for temporary relief in situations of this sort which are contained in Sections 74.1107 and 74.1109 of our Rules constitute the exercise of such authority. Without this power to fashion our rules and orders to the practical necessities of the situation, we could not carry out the provisions of the Act. The only alternative would be to seek an immediate injunction in court in order to preserve our jurisdiction to enter an effective order after a hearing, see *Federal Trade Commission* v. *Dean Foods Co.*, —— U.S. ——, decided June 13, 1966. Such action would not permit the initial consideration of the matter by the Commission, followed by judicial review which is preferable to immediate resort to the courts on a subject warranting the primary exercise of jurisdiction by the Commission. We believe we have the authority for interim action contemplated by our rules, in view of the broad mandate of the Communications Act and the established principle that all authority of an agency need not be found in the explicit language of the statute where the agency is created to deal with a host of problems whose exact nature is unforeseen. See *Public Service Commission* v. *Federal Power Commission*, 327 F. 2d 893, 896–897 (C.A.D.C., 1964). Second, respondents Mission and Sutohwest contend that their systems are 'grandfathered' to the limits of their franchises. We reject this position since it is totally inconsistent with the policy expressed in paragraph 149 of the Second Report (see, also, *Letter to Telerama, Inc.*, 3 FCC 2d 585). Finally, respondents contend that a grant of temporary relief will cause them irreparable injury.[11]

[11] Midwest has withdrawn its request for temporary relief as to Rancho Bernardo.

Mission's showing in this regard, however, is speculative, unsubstantiated, and proceeds on a mistaken understanding of the nature of the relief requested. Southwestern furnished an affidavit from a vice-president of the bank which has financed, and is committed for further loans to finance, the continued operations of Southwestern's CATV system. The affidavit states, in essence, that additional loans will not be made, *pendente lite,* if temporary relief is granted. This statement, however, refers to a stay against extension of service to additional subscribers, and while the petition originally requested relief in those terms, Midwest subsequently revised its request for temporary relief. The affidavit also states that the bank will not advance the remainder of the funds committed unless Southwestern is legally free to continue to add subscribers in the area covered by its existing pole attachment agreements. But Southwestern has not alleged or shown that the temporary relief now requested would prevent it from adding subscribers in these areas. As Midwest pointed out, and Southwestern did not deny, since Southwestern claimed only 900 subscribers and there are thousands of residents in the specific geographical areas designated by Midwest, the temporary relief requested would not halt normal wiring activities and the addition of many new subscribers pending final disposition. This same observation also applies to Mission and, additionally, under the temporary relief requested, neither Mission nor Southwestern would be prevented from extending their systems throughout their franchise areas if they limited their operations to the carriage of the San Diego signals. Accordingly, we find that neither Mission nor Southwestern has demonstrated that they will be irreparably injured if

some form of temporary relief is ordered.[12] We also specifically provide that if some form of irreparable injury not here shown or anticipated should develop during the pendency of the hearing, Mission and Southwestern may bring such new developments to our attention and we shall afford expedited consideration."

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

Released: July 26, 1966.

---

[12] We have considered Mission's request for oral argument with respect to the issue of temporary relief and do not believe that it would serve any useful purpose. Accordingly, the request will be denied. Other arguments advanced by respondents have also been considered and rejected.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,274

BUCKEYE CABLEVISION, INC.,
APPELLANT

v.

FEDERAL COMMUNICATIONS COMMISSION,
APPELLEE

D. H. OVERMYER TELECASTING CO.,
PERMITTEE OF UHF TELEVISION STATION WDHO-TV,
STORER BROADCASTING CO.,
THE ASSOCIATION OF MAXIMUM SERVICE TELECASTERS, INC.,
INTERVENORS

Appeal from the Federal Communications Commission

Decided June 30, 1967

Mr. Robert A. Marmet, with whom *Mr. Peter L. Koff* was on the brief, for appellant. *Mr. Edwin R. Schneider, Jr.*, also entered an appearance for appellant.

Mr. John H. Conlin, Associate General Counsel, Federal Communications Commission, with whom *Mr. Henry Geller*, General Counsel, and *Mrs. Lenore G. Ehrig*, Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. Victor E. Ferrall, Jr., with whom *Messrs. Bernard Koteen* and *Alan Y. Naftalin* were on the brief, for intervenor, Storer Broadcasting Company.

Messrs. Peter Shuebruk and *Herbert M. Schulkind* were on the brief, for intervenor, D. H. Overmyer Telecasting Co.

Messrs. Ernest W. Jennes and *John E. Vanderstar* were on the brief for intervenor, Association of Maximum Service Telecasters, Inc.

Before BAZELON, *Chief Judge*, PRETTYMAN, *Senior Circuit Judge*, and DANAHER, *Circuit Judge*.

BAZELON, *Chief Judge:* Buckeye Cablevision operates a community antenna television system (CATV) in Toledo, Ohio. Prior to May 27, 1966, it supplied paying subscribers with the signals of nine television stations located in Detroit, Lansing, Windsor, and Toledo. The signals are captured from the atmosphere with a master antenna and then retransmitted via cable to the subscribers' sets, which are specially wired for cable reception. On May 27, 1966, the Federal Communications Commission ordered Buckeye to cease and desist from carrying the signal of station WJIM-TV, Lansing, Michigan.[1] FCC regulations[2] prohibit CATV systems operating within one of the one hundred largest markets from extending the signals of distant stations beyond their "Grade B Contour"[3] unless

---

[1] 3 F.C.C.2d 798.

[2] 47 C.F.R. § 74.1107.

[3] A "Grade B Contour" is the line representing the service area in which a good picture is available 90 percent of the time at 50 percent of receiver locations. See Sixth Report and Order, Federal Communications Commission, 17 Fed. Reg. 3905, 3915 (1952). A CATV system is deemed to be operating within one of the one hundred largest markets for

the Commission has previously determined in a hearing that such carriage will be "consistent with the public interest and specifically the establishment and healthy maintenance of television broadcast service in the area."[4] Buckeye sought no such determination. Instead, it brought this review proceeding to challenge the Commission's distant-signal rules and the cease-and-desist order issued under them.

The distant-signal rules were first published in the Federal Register on March 17, 1966, as part of the Commission's Second Report and Order on CATV wherein it asserted jurisdiction over all CATV systems and adopted a comprehensive regulatory scheme.[5] The distant-signal rules are applicable to all systems that began carrying a distant signal after February 15, 1966. Buckeye began carrying WJIM-TV on March 16, 1966—the day the system went into operation—which is one month after the cutoff date and one day prior to the publication of the rules in the Federal Register. WJIM-TV is a "distant signal" and Toledo is one of the one hundred largest markets.

---

the purpose of the regulation whenever it is located within the Grade A Contour of any television station located in one of these markets. A "Grade A Contour" is the service area in which a good picture is available 90 percent of the time at 70 percent of receiver locations. *Ibid.*

[4] The regulations also provide for a waiver of the rules in certain situations. 47 C.F.R. § 74.1109. The Commission denied Buckeye's petition for a waiver, 3 F.C.C.2d 808 (1966), but Buckeye does not appeal from that denial.

[5] 2 F.C.C.2d 725 (1966). The Commission also adopted, *inter alia*, regulations controlling the degree to which CATV systems can duplicate the programing of local broadcasters, and stipulating the situations in which local broadcast stations must be carried by the systems. We are concerned only with the distant-signal rules, and not with any of the other regulations adopted by the Commission.

(1) A threshold question of first impression is whether the FCC has jurisdiction to regulate those CATV systems which employ no microwave transmission.[6]

The Communications Act, which directs the Commission to provide "a rapid, efficient, Nation-wide and world-wide wire and communication service . . . ,"[7] applies to "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or transmission of energy by radio . . . ."[8] To achieve the goals of the Act, the Commission is directed, *inter alia*, to establish "areas or zones to be served by any [broadcast] station,"[9] to issue broadcast licenses to "provide a fair, efficient, and equitable distribution of radio service" to the states and communities of the United States,[10] and to promulgate rules and regulations to effectuate its responsibilities.[11]

The Commission determined in the Second Report and Order that CATV systems are engaged in "communica-

---

[6] Compare our decision in *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S.App. D.C. 93, 321 F.2d 359, *cert. denied*, 375 U.S. 951 (1963), where we upheld the Commission's power to regulate CATV systems served by microwave through its power to regulate microwave carriers. And see First Report and Order on CATV, 38 F.C.C. 683 (1965), in which regulations applicable to microwave-served systems were adopted.

[7] 47 U.S.C. § 151 (1964).

[8] 47 U.S.C. § 152 (1964).

[9] 47 U.S.C. § 303(h) (1964).

[10] 47 U.S.C. § 307(b) (1964).

[11] See 47 U.S.C. §§ 154(i), 303(f), (r) (1964).

tions by wire" within the meaning of the Act.[12] It had already found that such systems enlarge the number of stations otherwise available to their subscribers, thereby splintering the market, and potentially decreasing audience size and, ultimately, the advertising revenues of local stations.[13] It concluded that further unregulated growth of CATV represents a substantial economic threat to licensed television broadcast stations, and thus to the system of station allocations the Commission has established.

To meet this situation in the major population centers, the Commission promulgated the distant-signal rules, relying on its responsibility to insure "fair and equitable" station distribution by regulating service "areas and zones." The CATV threat in the major markets is especially serious, because large scale CATV operation in these markets might deter and possibly destroy the development of free, nonnetwork UHF stations which, for a variety of reasons, are likely to be economically weak even without CATV competition.[14] Although there is some evidence con-

---

[12] 47 U.S.C. § 153(a) (1964). Buckeye does not dispute the Commission's conclusion that since CATV systems transmit "pictures and sounds . . . by aid of wire" and are "instrumentalities . . . [used for] . . . the receipt, forwarding, and delivery of communications . . . incidental to such transmission," they are engaged in wire communication.

[13] See generally First Report and Order on CATV, 38 F.C.C. 683 (1965); *Carter Mountain Transmission Corp.* v. *Federal Communications Commission, supra* note 6.

[14] In large metropolitan areas already served by television stations affiliated with the three major networks, new UHF entrants must offer independent nonnetwork programing. The audience for such programing is limited (according to FCC estimates, about 10 percent of viewers during prime viewing hours), and UHF stations are further handicapped by the fact that many receivers are not equipped for UHF

cerning adverse CATV impact in these markets, the extent of the danger is not yet clear enough for the application of fixed prohibitions. The rules reflect the Commission's decision to examine each situation on an ad hoc basis. We think it has chosen an eminently reasonable course. The growth of CATV is so rapid that, if it is allowed to proceed unabated, harm to the regulatory scheme can occur before the FCC can act.[15] Further, subsequent regulation might disrupt large numbers of CATV systems with heavy capital investment and substantial public reliance on their services. The distant-signal rules afford the Commission an opportunity to determine on a case-by-case basis whether the public interest in the future of communications will be obstructed by each CATV operation.

Buckeye argues, however, that the Commission cannot rest jurisdiction on CATV's close relationship to regulated broadcast stations. It points out that the asserted basis for regulation is Subchapter III of the Communications Act which provides for the licensing of broadcasting,[16]

---

reception. This problem has been remedied by congressional passage of legislation designed to allow the FCC to require UHF capability for all commercial receivers. 47 U.S.C. § 303(s) (1964). And see H.R. REP. No. 1559, S. REP. No. 1526, 87th Cong., 2d Sess. (1962). But this legislation, which reflects Congressional concern for the development of UHF independent stations, has not yet fully taken hold. Thus the new UHF entrant may have a difficult time operating at a profit. CATV can compound the problem. Its chief attraction in the markets already possessing full network coverage would be its ability to offer the programs of independent stations. Thus it would splinter the already limited market for nonnetwork programing.

[15] See Second Report and Order on CATV, 2 F.C.C.2d 725, 771-72.

[16] 47 U.S.C. § 301, *et seq.* (1964). The Commission has declined to regulate CATV under the common carrier provisions of Subchapter II. See *Philadelphia Television Broad-*

and that CATV systems are not broadcasters subject to licensing because they do not employ radio frequencies to distribute signals. Relying on *Regents of the University of Georgia* v. *Carroll*, 338 U.S. 586 (1950), Buckeye asserts that the FCC's only permissible function under Subchapter III is licensing of broadcasters, and thus it may not control the signals Buckeye can deliver to its customers. We think this reliance is misplaced.

In *Carroll*, the Supreme Court held that the Commission's duty to effectuate the public interest requirements of Subchapter III "centered" [17] around its licensing power, which does not encompass abridgment of contracts between licensees and third parties. But the Court's view of this limitation was based largely on the agency's lack of authority at that time to issue cease-and-desist orders, against licensees or anyone else, to prevent violations of the Act. Subsequently Congress conferred such authority,[18] which correspondingly expanded the Commission's power to protect the regulatory scheme. We do not have to decide the degree to which *Carroll* may still be viable since we think that, in any event, it does not bar Commission authority to regulate a form of wire communication which enlarges the signal range of licensee stations to the potential detriment of the entire regulatory scheme.[19]

---

casting Co. v. *Federal Communications Commission*, 123 U.S. App.D.C. 298, 359 F.2d 282 (1966).

[17] 338 U.S. at 599.

[18] 47 U.S.C. § 312(b) (1964).

[19] It is clear that a CATV system is more than simply a passive recipient of television signals, indistinguishable from a rooftop antenna; CATV systems engage in commercial retransmission of the signals they receive. We also reject the suggestion that the Commission's powers are rigidly compartmentalized into "licensing" and "public utility regulation" functions. See *Carter Mountain Transmission Corp.* v.

Our view is bolstered by the cases which have recognized implied agency authority to deal with aligned activities which may affect the regulatory system entrusted to the agency. "Congress in passing the Communications Act of 1934 could not . . . anticipate the variety and nature of methods of communication by wire or radio that would come into existence . . . ." In such a situation, the expert agency entrusted with administration of a dynamic industry is entitled to latitude in coping with new developments in that industry."[20] It would "frustrate the purposes for which . . . [the Act] was brought into being [if Congress had attempted] an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency."[21]

We reject Buckeye's further contention that it engages only in intrastate commerce and is therefore exempt from FCC regulation. Although Buckeye and its customers are located in the Toledo area, its facilities are a link in the interstate transportation of television signals. It receives programs which originate outside the state and retransmits them by cable to its customers.[22]

(2) The distant-signal rules are also challenged as an

Federal Communications Commission, supra note 6. Regardless of the label attached to the distant-signal rules, they reflect a reasonable exercise of Commission power to prevent the extension of television signals beyond their predicted range whenever such extension is not in the public interest.

[20] *Philadelphia Television Broadcasting Co.* v. *Federal Communications Commission,* 123 U.S.App.D.C. 298, 300, 359 F.2d 282, 284 (1966).

[21] *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 219 (1943). See also *American Trucking Association* v. *United States,* 344 U.S. 298, 311 (1953) (I.C.C. may regulate practices not mentioned in Act which may directly frustrate the success of the regulatory scheme).

[22] See *Idaho Microwave* v. *Federal Communications Commission,* 122 U.S.App.D.C. 253, 256, 352 F.2d 729, 732 (1965).

illegal restraint on First Amendment rights. It is true that CATV systems disseminate programs carrying a wide range of information. But we think the restraint imposed by the rules is no more than is reasonably required to effectuate the public interest requirements of the Act.[23] As we have pointed out, the rules are not a flat bar against distant-signal importation. The restraint may be only temporary if Buckeye can show that carrying WJIM-TV will not adversely affect broadcasting in Toledo.

Buckeye claims, however, that, as a practical matter, the heavy burden established by the Commission for such hearings makes relief only a remote possibility and thus that the restraint is absolute. Although the regulations are phrased in broad terms, we cannot say that on their face they impose such a heavy burden.[24] And, since Buckeye has not sought any hearing, we cannot know how the Commission will apply them. Buckeye's complaint is therefore premature.

(3) Buckeye also contends that the rulemaking proceedings under review violated the requirements of the Administrative Procedure Act in several respects.

It says first that the Notice of Inquiry issued on April 22, 1965, failed adequately to specify the substance of the proposed rules. We cannot agree. The Notice was issued simultaneously with the FCC's assertion of jurisdiction over CATV systems employing microwave carriers and its

---

[23] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-27 (1943); *Carter Mountain Transmission Corp.* v. *Federal Communications Commission*, 116 U.S.App.D.C. 93, 98, 321 F.2d 359, 364, *cert. denied*, 375 U.S. 951 (1963).

[24] A CATV system must show that distant-signal carriage "will be consistent with the public interest and specifically the establishment and healthy maintenance of television broadcasting service in the area." Given the conjecture presently surrounding the question of CATV impact, perhaps these regulations are as specific as possible.

issuance of regulations to deal with them.[25] The Notice sought comments on the Commission's view favoring assertion of jurisdiction over all CATV systems and on its proposal to adopt for such non-microwave systems the "carriage" and "nonduplication" rules it had adopted that day for CATV systems employing microwave carriers. The Notice also discussed "the mushrooming entry of CATV into major centers of population," and the Commission specifically requested comment on a rule that would prohibit extending the signal of any station beyond its Grade B contour into markets that were defined so as to include Toledo.[26]

Buckeye secondly contends that the Notice of Inquiry misled interested parties to believe that further notice and opportunity for comment would precede the adoption of final rules. The Commission did suggest that a further Notice would "in all likelihood" be issued "to afford opportunity for comment on" its proposals. But the Commission also made clear that it desired full comment so as to be in a position to establish rules without further proceedings.[27] Numerous interested parties filed extensive com-

---

[25] First Report and Order on CATV, 38 F.C.C. 683 (1965).

[26] See Notice of Inquiry and Proposed Rulemaking, 1 F.C.C. 2d 453, 471-72 (1965). We cannot agree with Buckeye that the failure to mention "grandfather rights" is a fatal defect in the Notice. The Administrative Procedure Act requires only that the notice contain "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C.A. § 553(b)(3) (1966). See *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App.D.C. 342, 210 F.2d 24 (1954); *Owensboro on the Air, Inc.* v. *United States*, 104 U.S.App.D.C. 391, 262 F.2d 702 (1958), *cert. denied*, 360 U.S. 911 (1959).

[27] The Commission said:

> In the absence of further information, we do not have a sound basis for specific rule proposals. However, in

ments on the rules in question,[28] and there is no evidence or claim that any of them withheld pertinent data or argument in reliance upon the possibility of a future proceeding. And we find no basis for Buckeye's assertion of bad faith on the part of the Commission. We are entirely satisfied that any possible ambiguity in the Commission's statements did not affect the fairness of the proceedings.

Buckeye next complains that, although the Administrative Procedure Act does not require an evidentiary hearing or oral argument,[29] the opportunity should have been

---

order to be in a position to take any rulemaking action found appropriate at the conclusion of this proceeding, without conducting new proceedings, comments are requested on the proposals of petitioners and the additional matters indicated above.

* * *

Consideration of nonmicrowave CATV systems is included in order to conserve time and to avoid the necessity for a second proceeding, particularly in the event that no legislation is forthcoming and the comments in this proceeding confirm our initial conclusion that the Commission has present jurisdiction over all CATV systems. Moreover, we believe it appropriate . . . to put all persons who now operate or who propose to operate CATV systems on notice that CATV operations may be subject to Commission regulation of the nature indicated, whether microwave is used or not. 1 F.C.C.2d at 476-77.

[28] Sixty interested parties, many of whom also represented other interested persons, filed comments and/or reply comments in this proceeding. See Second Report and Order, 2 F.C.C.2d 789-90 (1966). In addition, the Commission reported receiving a large number of informal comments and letters. *Id.* at 726 n. 2. The views expressed are summarized at *Id.*, pp. 790-93.

[29] The Administrative Procedure Act requires only that interested parties be allowed to submit data and argument "with or without opportunity to present the same orally in any manner.". 5 U.S.C.A. § 553(c) (1966).

given because of the importance of the issues. It does not suggest what arguments and data required such presentation, and why.[30] In these circumstances, we find no basis for disturbing the Commission's discretion to control the course of its own proceedings.[31]

(4) We also reject Buckeye's contention that the distant-signal rules constitute invalid retroactive regulation. Although published in the Federal Register on March 17, 1966, the rules are applicable to all CATV systems that began carrying distant signals after February 15, 1966. The rules do not penalize Buckeye for carrying distant signals during the period prior to their effective date; rather they make carriage of such signals illegal *from and after* the effective date.

The rule is not retroactive,[32] but simply confers "grand-

---

[30] See *American Airlines, Inc.* v. *Civil Aeronautics Board*, 123 U.S.App.D.C. 310, 319, 359 F.2d 624, 633, *cert. denied*, 385 U.S. 843 (1966). Buckeye's principal contention seems to be that the numerous conflicting comments submitted made oral argument necessary so that the Commission could clarify and synthesize the written inconsistencies. It seems peculiarly within the Commission's discretion to decide whether it needs oral argument to sort out conflicts in the rulemaking comments. At any rate, the distant-signal rules were promulgated not after conflicts were resolved, but *because of* the Commission's determination that there were questions of CATV impact that could not presently be resolved. Buckeye has failed to show how oral presentation would have supplied answers to these questions.

[31] *Federal Communications Commission* v. *WJR, The Goodwill Station*, 337 U.S. 265 (1949). And see 47 U.S.C. § 154(j) (1964) which authorizes the FCC "to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."

[32] Even a rule of retroactive effect is valid if reasonable. See, *e.g.*, *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, No. 19,887, decided May 18, 1967, slip op., pp.

father rights" upon those systems which began carrying distant signals before the regulations were announced. The cutoff date—February 15—is the date of the Commission's first and widely circulated public announcement that it had adopted the distant-signal rules and that they would be applicable to operations thereafter commenced. The Commission sought to avoid unnecessary disruption of the viewing habits of those who had subscribed to CATV prior to the adoption of the regulations. On the other hand, it faced the danger that many new systems, not yet in operation, would begin nominal operations in the major markets to avoid the requirement of a public interest determination and thus destroy the plan.[33]

We think the "grandfather rights" manifested the Commission's "felt need for regulating . . . [CATV], while at the same time . . . satisfied the dictates of fairness by affording sanction for enterprises theretofore established."[34]

8-13. For the reasons discussed *infra*, we find the present rule reasonable.

[33] The Commission has set out an adequate basis for these fears in the Second Report and Order, 2 F.C.C.2d 725, 784-85 (1966), and in its Memorandum Opinion and Order denying motions for a stay of the rules pending decision on petitions for reconsideration. See 3 F.C.C.2d 816, 819-23 (1966). While the Commission could not be certain how many systems would seek to beat the gun, there was evidence that a large number of systems were preparing to begin operations, and that many of them were located in the major markets.

Any date the Commission could have selected would have adversely affected some CATV systems preparing for operation. But those contemplating entering the field have been on notice since April 22, 1965, that the Commission might adopt regulations like the distant-signal rules, and presumably could plan accordingly. And the impact of the Commission's choice of a cutoff date is ameliorated since the affected systems can attempt to show that their importation of distant signals would be consistent with the public interest.

[34] *United States* v. *Maher*, 307 U.S. 148 (1939). We also

(5) Finally, we find no merit in the claims that the Commission unfairly and illegally expedited the cease-and-desist hearing and that it erroneously refused to consider any question at the hearing aside from the narrow one whether Buckeye was operating in violation of the rules. The Commission, relying in part on information developed in the rulemaking proceedings, amply justified its decision to expedite action.[35] And, since the record was not closed until Buckeye had indicated that it would not introduce evidence directed to the question whether carriage of WJIM was a violation, Buckeye was not prejudiced by the expedited procedure followed. Moreover, many of the issues Buckeye sought to ventilate at the cease-and-desist hearing were considered by the Commission in the Second Report and Order and in its denial of Buckeye's request for waiver of the distant-signal rules.[36]

Affirmed.

---

reject Buckeye's claim that the FCC lacked sufficient "good cause" to make the rule effective on March 17, the day of publication in the Federal Register, rather than waiting the full 30 days normally required by the Administrative Procedure Act, 5 U.S.C.A. § 553(d) (1966). Since the cutoff date had been set at February 15, the Commission properly sought to minimize the disruption in service to CATV subscribers that would result when the rules became effective,

[35] See 3 F.C.C.2d 798, 801-05 (1966).

[36] 3 F.C.C.2d 808 (1966). Consequently our decision in *C. J. Community Services* v. *Federal Communications Commission*, 100 U.S.App.D.C. 379, 246 F.2d 660 (1957), is inapplicable. And see *Booth American Co.* v. *Federal Communications Commission*, —— U.S.App.D.C. ——, 374 F.2d 311 (1967).

APPENDIX E

COMMUNICATIONS ACT OF 1934

SEC. 1. For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communication, and for the purpose of securing a more effective execution of this policy by centralizing authority heretofore granted by law to several agencies and by granting additional authority with respect to interstate and foreign commerce in wire and radio communication, there is hereby created a commission to be known as the "Federal Communications Commission", which shall be constituted as hereinafter provided, and which shall execute and enforce the provisions of this Act.

SEC. 2. (a) The provisions of this Act shall apply to all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided; but it shall not apply to

persons engaged in wire or radio communication or transmission in the Canal Zone, or to wire or radio communication or transmission wholly within the Canal Zone.

SEC. 3. For the purposes of this Act, unless the context otherwise requires—

(a) "Wire communication" or "communication by wire" means the transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between the points of origin and reception of such transmission, including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission.

* * * * *

(e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, to any other State, Territory, or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of title II of this Act, include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission.

SEC. 4(i). The Commission may perform any and all acts, make such rules and regulations, and issue

such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

SEC. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same territory, possession, or district; or (b) from any State, Territory, or possession of the United States, or from the District of Columbia to any other State, Territory, or possession of the United States; or (c) from any place in any State, Territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said State to any place beyond its borders, or from any place beyond its borders to any place within said State, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said State; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in

that behalf granted under the provisions of this Act.

Sec. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires shall—

* * * * *

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: *Provided, however,* that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

* * * * *

(h) Have authority to establish areas or zones to be served by any station;

* * * * *

(r) Make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act, or any international radio or wire communications treaty or convention, or regulations annexed thereto, including any treaty or convention insofar as it relates to the use of radio, to which the United States is or many hereafter become a party.

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public.

SEC. 307(b) In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distribution of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

SEC. 312(b) Where any person (1) has failed to operate substantially as set forth in a license, (2) has violated or failed to observe any of the provisions of this Act, or section 1304, 1343, or 1464 of title 18 of the United States Code, or (3) has violated or failed to observe any rule or regulation of the Commission authorized by this Act or by a treaty ratified by the United States, the Commission may order such person to cease and desist from such action.

APPENDIX F

§§ 74.1107 AND 74.1109 OF THE COMMISSION'S RULES

47 CFR 74.1107 AND 74.1109

§ 74.1107 Requirement for showing in evidentiary hearing and Commission approval in top 100 television markets; other procedures

(a) No CATV system operating within the predicted Grade A contour of a television broadcast station in the 100 largest television markets shall extend the signal of a television broadcast station beyond the Grade B contour of that station, except upon a showing, approved by the Commission, that such extension would be consistent with the public interest, and specifically the establishment and healthy maintenance of television broadcast service in the area. Commission approval of a request to extend a signal in the foregoing circumstances will be granted where the Commission, after consideration of the request and all related materials in a full evidentiary hearing, determines that the requisite showing has been made. The market size shall be determined by the rating of the American Research Bureau, on the basis of the net weekly circulation for the most recent year.

(b) A request under paragraph (a) of this section shall be filed after the CATV system has obtained any necessary franchise for operation or has entered into a lease or other arrangement to use facilities and shall set forth the name of the community involved, the date on which a franchise was obtained, the signal

or signals proposed to be extended beyond their Grade B contours, and the specific reasons why it is urged that such extension is consistent with the public interest. Public notice will be given of the filing of such a request, and interested parties may file a response or statement within thirty (30) days after such public notice. A reply to such responses or statement may be filed within a twenty (20) day period thereafter.

The Commission shall designate the request for an evidentiary hearing on issues to be specified, with the burden of proof and the burden of proceeding with the introduction of evidence upon the CATV system making the request, unless otherwise specified by the Commission as to particular issues.

(c) No CATV system, located so as to fall outside the provisions of paragraph (a) of this section, shall extend the signal of a television broadcast station beyond the Grade B contour of that station, where the Commission, upon its own motion or pursuant to a petition filed under § 74.1109, determines after appropriate proceedings, that such extension would be inconsistent with the public interest, taking into account particularly the establishment and healthy maintenance of television broadcast service in the area.

(d) The provisions of paragraphs (a) and (b) of this section shall not be applicable to any signals which were being supplied by a CATV system to its subscribers on February 15, 1966, and pursuant to a franchise (where necessary) issued on or before that date: *Provided, however,* That any new franchise or amendment of an existing franchise after February 15, 1966, to operate or extend the operations of the CATV system in the same general area does come within the provisions of paragraphs (a) and (b) of this section: *And provided further,* That no CATV system located in the 100 largest television markets,

which was supplying to its subscribers on February 15, 1966, a signal carried beyond its Grade B contour, shall extend its service to new geographical areas where the Commission, upon petition filed under § 74.1109 by a television broadcast station or other interested person located in the area and after consideration of the response of the CATV system and appropriate proceedings, determine that the public interest, taking into account the considerations set forth in the Second Report and Order in Docket Nos. 14895, 15233, and 15971, FCC 66–220, pars. 113–149, would be served by appropriate conditions limiting the geographical extension of the system to new areas. The Commission may also consider, upon the basis of the pleadings before it, whether temporary relief is called for in the public interest, and, if so, the nature of such relief; no CATV system coming within the foregoing provision shall extend its service to new geographical areas in violation of the terms of the specified temporary relief.

§ 74.1109 Procedures applicable to petitions for waiver of the rules, additional or different requirements and rulings on complaints or disputes

(a) Upon petition by a CATV system, an applicant, permittee, or licensee of a television broadcast, translator, or microwave relay station, or by any other interested person, the Commission may waive any provision of the rules relating to the distribution of television broadcast signals by CATV systems, impose additional or different requirements, or issue a ruling on a complaint or disputed question.

(b) The petition may be submitted informally, by letter, but shall be accompanied by an affidavit of service on any CATV system, station licensee, permit-

tee, applicant, or other interested person who may be directly affected if the relief requested in the petition should be granted.

(c)(1) The petition shall state the relief requested and may contain alternative requests. It shall state fully and precisely all pertinent facts and considerations relied upon to demonstrate the need for the relief requested and to support a determination that a grant of such relief would serve the public interest. Factual allegations shall be supported by affidavit of a person or persons with actual knowledge of the facts, and exhibits shall be verified by the person who prepares them.

(2) A petition for a ruling on a complaint or disputed question shall set forth all steps taken by the parties to resolve the problem, except where the only relief sought is a clarification or interpretation of the rules.

(d) Interested persons may submit comments or opposition to the petition within thirty (30) days after it has been filed. Upon good cause shown in the petition, the Commission may, by letter or telegram to known interested persons, specify a shorter time for such submissions. Comments or oppositions shall be served on petitioner and on all persons listed in petitioner's affidavit of service, and shall contain a detailed full showing, supported by affidavit, of any facts or considerations relied upon.

(e) The petitioner may file a reply to the comments or oppositions within twenty (20) days after their submission, which shall be served upon all persons who have filed pleadings and shall also contain a detailed full showing, supported by affidavit, of any additional facts or considerations relied upon. Upon good cause shown, the Commission may specify a shorted time for the filing of reply comments.

(f) The Commission, after consideration of the pleadings, may determine whether the public interest would be served by the grant, in whole or in part, or denial of the request, or may issue a ruling on the complaint or dispute. The Commission may specify other procedures, such as oral argument, evidentiary hearing, or further written submissions directed to particular aspects, as it deems appropriate. In the event that an evidentiary hearing is required, the Commission will determine, on the basis of the pleadings and such other procedures as it may specify, whether temporary relief should be accorded to any party pending the hearing and the nature of any such temporary relief. Where a petition involves new service to subscribers (other than service coming within the provisions of § 74.1107(a) of this chapter), the Commission will expedite its consideration and promptly issue a ruling either on the merits of the petition or on the interlocutory question of temporary relief pending further procedures.

(g) Where a request for temporary relief is contained in a petition with respect to service coming within the provisions of § 74.1107(d) of this chapter, opposition to such request for temporary relief shall be filed within ten (10) days and reply comments within seven (7) days thereafter. The Commission will expedite its consideration of the question of temporary relief.

(h) Where a petition for waiver of the provisions of § 74.1103(a) of this chapter is filed within fifteen (15) days after a request for carriage, the system need not carry the signal of the requesting station pending the Commission's ruling on the petition or on the interlocutory question of temporary relief pending further procedures.

269-328 O - 67 - 7

APPENDIX G

CATV CASES PENDING IN THE COURTS OF APPEALS [1]

A. IN THE DISTRICT OF COLUMBIA CIRCUIT

1. *Cedar Rapids Television Company (KCRG–TV) and WMT–TV, Inc. (WMT–TV)* v. *Federal Communications Commission and the United States of America*, No. 20783.
2. *Mobile Video Tapes, Inc.* v. *Federal Communications Commission*, No. 20797.
3. *Indiana Broadcasting Corporation* v. *Federal Communications Commission and United States of America*, No. 20833.
4. *Indiana Broadcasting Corporation (WANE–TV)* v. *Federal Communications Commission and United States of America*, No. 20990.
5. *Channel 9, Syracuse, Inc.* v. *Federal Communications Commission*, No. 20843.
6. *Channel 9, Syracuse, Inc.* v. *Federal Communications Commission and United States of America*, No. 20915.
7. *Hubbard Broadcasting Inc.* v. *Federal Communications Commission*, No. 20924.
*8. *Valley Vision, Inc.* v. *Federal Communications Commission*, No. 21063.

(NOTE.—Items 3 and 4 have been consolidated, as have Items 5 and 6.)

[1] Cases marked with an asterisk raise the jurisdictional issue.

B. IN THE FIRST CIRCUIT

9. *Van Buren TV Cable Co., Inc.* v. *Federal Communications Commission and United States of America,* No. 6897.
10. *Presque Isle TV Co., Inc., et al.* v. *Federal Communications Commission and United States of America,* No. 6896.

(NOTE. Items 9 and 10 have been consolidated.)

C. IN THE THIRD CIRCUIT

11. *Titusville Cable Co.* v. *Federal Communications Commission and United States of America,* No. 16559.
*12. *Byron McCracken, Jr., d.b.a. South Side Cable Company* v. *Federal Communications Commission and United States of America,* No. 16650.

(NOTE.—A motion has been filed seeking to consolidate Items 11 and 12.)

D. IN THE SIXTH CIRCUIT

13. *Telerama, Inc.* v. *Federal Communications Commission and United States of America,* No. 17311.

E. IN THE EIGHTH CIRCUIT

*14 *Black Hills Video Corp. and Midwest Video Corp.* v. *Federal Communications Commission and United States of America,* No. 18052.
*15. *Midwest Video Corporation and Black Hills Video Corp.* v. *Federal Communications Commission,* No. 18348, formerly District of Columbia Court of Appeals No. 20264.

*16. *Midwest Television, Inc.* v. *Federal Communications Commission and United States of America,* No. 18481 formerly District of Columbia Court of Appeals No. 19976.

*17. *Midwest Television, Inc.* v. *Federal Communications Commission and the United States of America,* No. 18482 formerly District of Columbia Court of Appeals No. 20021.

*18. *Alice Cable Television Corporation, A Subsidiary of the Jerrold Corporation* v. *Federal Communications Commission and United States of America,* formerly No. 18793.

*19. *Mission Cable TV, Inc., Pacific Video Cable Co., and Trans-Video Corp.* v. *Federal Communications Commission and United States of America,* No. 18839.

*20. *Buckeye Cablevision, Inc.* v. *Federal Communications Commission and United States of America,* No. 18813.

(NOTE.—All of the foregoing have been consolidated.)

F. IN THE NINTH CIRCUIT

*21. *Valley Vision, Inc.* v. *Federal Communications Commission and United States of America,* No. 21870.

*22. *Valley Vision, Inc.* v. *Federal Communications Commission and United States of America,* No. 21869.

G. IN THE TENTH CIRCUIT

23. *Conley Electronics Corporation d/b/a Teleprompter of Liberal, Inc.* v. *Federal Communications Commission and United States of America,* No. 9503.

U.S. GOVERNMENT PRINTING OFFICE: 1967 O—269-328